Citywide Service Corp., and its alter ego Hudson Service Corp. *and* Sandra Estrada *and* Estella Sapia *and* Patricia Godash

Hudson Service Corp. *and* Local 32B-32J, Service Employees International Union, AFL–CIO and Production and Service Employees International Union, Local 143 Ind., Party to the Contract

Production and Service Employees International Union, Local 143 Ind. *and* Local 32B-32J, Service Employees International Union, AFL–CIO. Cases 2–CA–25016, 2–CA–25033, 2–CA–25057, 2–CA–25331, 2–CA–25434, and 2–CB–14082

June 15, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

This case presents several unfair labor practice issues concerning the transfer of operations from Respondent Citywide Service Corp., which had a collective-bargaining agreement with Local 32B-32J, Service Employees International Union, AFL–CIO (Local 32B-32J) for a unit of service employees, to alter ego Respondent Hudson Service Corp., which recognized and executed a collective-bargaining agreement with Respondent Production and Service Employees International Union, Local 143 Ind. (Respondent Local 143) for a unit of service employees.[1]

The Board has considered the decision and the record in light of the exceptions and brief, and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and to adopt the recommended Order as modified.

1. There are no exceptions to the judge's finding that Respondent Hudson Service Corp. violated Section 8(a)(2) of the National Labor Relations Act (the Act) because it recognized Respondent Local 143 as the exclusive collective-bargaining representative of Hudson employees at a time when Local 143 had not obtained authorization cards from a majority of service employees in the bargaining unit. We affirm this finding. The General Counsel's exceptions, however, reiterate his contention that another basis exists for finding this violation. We agree.

The General Counsel relies on undisputed evidence that: (1) Hudson is the alter ego of Respondent Citywide Service Corp.; (2) Local 32B-32J was the majority representative of Citywide's service employees; (3) Citywide's collective-bargaining agreement with Local 32B-32J for the service employee unit was not due to expire until December 31, 1992; and (4) Hudson recognized Local 143 as representative of a service employee unit in September 1991, while the Local 32B-32J agreement was still in effect. Under these circumstances, the General Counsel correctly contends that Local 32B-32J continued to be the exclusive bargaining representative, under Section 9(a) of the Act, of the service employees of Citywide and its alter ego Hudson. No other union could lawfully represent those employees when Hudson recognized Local 143. For this reason, we find that Hudson's recognition of Local 143 and its subsequent execution and enforcement of a collective-bargaining agreement with that union violated Section 8(a)(2) of the Act irrespective of whether Local 143 had obtained authorization cards from a majority of unit employees at the time of recognition.[3]

2. The General Counsel also excepts to the judge's finding that the limitations period in Section 10(b) of the Act bars finding that alter egos Citywide and Hudson violated Section 8(a)(5) by failing, since August 5, 1991, to continue recognition of Local 32B-32J as the exclusive representative of the service employee unit and to abide by the terms of the Citywide contract. We find merit in these exceptions.

The 8(a)(5) allegation first appeared in a second amended charge filed on January 21, 1993, by Local 32B-32J in Case 2–CA–25331. On February 19, 1993, the Regional Director issued an order to amend the consolidated complaint further to include this allegation. The General Counsel has conceded that the 8(a)(5) charge was untimely filed nearly 1-1/2 years after the alleged bargaining violation. He has contended, however, that there are two reasons for finding that Section 10(b) does not bar litigation of the charge: (1) Respondents Citywide and Hudson fraudulently concealed their alter ego relationship, and (2) the 8(a)(5) allegation was closely related to timely filed 8(a)(2) charges.

The judge expressly considered and rejected the General Counsel's fraudulent concealment theory as a basis for tolling Section 10(b) for more than a few months, an insufficient period of time to support find-

[1] On March 24, 1994, Administrative Law Judge Steven Davis issued the attached decision. The General Counsel filed exceptions and a supporting brief. Respondent Local 143 filed exceptions. The Charging Party, Local 32B-32J, filed cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] In fn. 4 of the judge's decision, he referred to the testimony of Hugo Tzorin. We note that Tzorin did not testify in this proceeding. In sec. II,A, par. 18, the judge referred to employee Estrada, when he clearly meant employee Sapia. These errors do not affect the result in this case.

[3] See *Regional Import Trucking Co.*, 292 NLRB 206, 229 (1988). For the reasons stated above and in the judge's decision, we find no merit in Local 143's exceptions to the judge's findings that it violated Sec. 8(b)(1)(A) and (2) by accepting recognition from Hudson and by entering into a collective-bargaining agreement with it. We note that the judge did not attach a copy of the remedial notice which Local 143 must post as part of the remedy for its unfair labor practices. We have attached this notice, marked ''Appendix B,'' to our Decision and Order.

ing the January 21, 1993, 8(a)(5) charge to be timely. The General Counsel does not except to the rejection of this argument. He does except, however, to the judge's failure to consider the alternative ''closely related'' argument against imposition of the 10(b) bar.

In determining whether untimely filed allegations are closely related to timely filed allegations, the Board considers ''whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge,'' ''whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge,'' and ''whether a respondent would raise the same or similar defenses to both allegations.'' *Redd-I, Inc*., 290 NLRB 1115, 1118 (1988). In this case, each of these factors warrants finding that the 8(a)(5) allegation is closely related to the timely filed 8(a)(2) charge. First, as demonstrated by the analysis in the preceding section of this decision, the refusal to bargain allegation involves the same legal theory as the unlawful recognition theory, i.e., that Citywide and Hudson were alter egos and were bound to recognize Local 32B-32J's continuing status as the 9(a) representative of their service employees.[4] Second, the allegations clearly arise from the same factual situation involving Citywide's collective-bargaining relationship with Local 32B-32J, Citywide's demise, Hudson's commencement of operations, and Hudson's collective-bargaining relationship with Local 143. Finally, we find that the Respondents would have raised similar defenses and presented similar evidence for both allegations. Indeed, the principal, if not the only defense to the common 8(a)(2) and (5) theory of violation is that Hudson is not an alter ego of Citywide. Hudson has fully litigated this defense of its conduct.

Based on the foregoing, we find that Section 10(b) does not bar the litigation of 8(a)(5) allegations which are closely related to 8(a)(2) allegations in timely filed charges. We further find, based on undisputed facts, that Respondent Hudson and its alter ego Citywide violated Section 8(a)(5) of the Act on and after August 5, 1991, by failing to recognize Local 32B-32J as the exclusive representative of all employees in the appropriate bargaining unit and by failing to adhere to and apply the terms of the extant collective-bargaining agreement with Local 32B-32J for those unit employees.

[4] Allegations involving the same class of violations usually involve the same section of the Act, but this is not invariably so. See, e.g., *Whitewood Maintenance Co*., 292 NLRB 1159, 1169–1170 (1989), where the Board held that an untimely 8(a)(2) allegation was closely related to a timely 8(a)(5) allegation. The litigation of an additional, independent 8(a)(2) theory of violation (Local 143's lack of a majority card showing) does not negate the significance of a theory of violation common to both the 8(a)(2) and (5) violations.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 6.

''6. By recognizing Local 143 as the exclusive bargaining representative of its employees, and by entering into a collective-bargaining agreement containing a union-security clause with Local 143 on September 13, 1991, covering the employees, at a time when Local 143 did not represent an uncoerced majority of the employees, or when Local 32B-32J was the recognized exclusive bargaining representative of those employees, Respondent Hudson violated Section 8(a)(1), (2), and (3) of the Act.''

2. Substitute the following for Conclusions of Law 12 and 13.

''12. By interrogating employees about their union sympathies, Respondent Citywide violated Section 8(a)(1) of the Act.

''13. By refusing to recognize and bargain with Local 32B-32J as the exclusive bargaining representative of all the employees in the appropriate unit, and by failing to adhere to the terms of a collective-bargaining agreement, effective from January 1, 1990, to December 31, 1992, with Local 32B-32J, Respondents Hudson and Citywide have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.''

AMENDED REMEDY

Having found that Respondents Citywide Service Corp., and its alter ego Hudson Service Corp. violated Section 8(a)(5) and (1) of the Act, we shall order them to recognize and, on request, bargain with Local 32B-32J as the exclusive bargaining representative of all employees in the appropriate unit. We shall also order the Respondents, on request by the Union, to reinstate the terms and conditions of employment set forth in the January 1, 1990, to December 31, 1992 collective-bargaining agreement with Local 32B-32J, and to make whole any employees who may have incurred losses as a result of their unlawful failure to adhere to the terms of that agreement. Any backpay owed shall be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondents shall also make whole employees by making any unpaid fringe benefit fund contribution payments since August 5, 1991, as provided by the above-mentioned collective-bargaining agreement,[5] and by reimbursing employees for any expenses ensuing from the Re-

[5] Because the provisions of employee benefit fund agreements are variable and complex, we leave to the compliance stage the question whether the Respondents must pay any additional amounts into the benefit funds in order to satisfy our ''make-whole'' remedy. *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979).

spondents' failure to make such contribution payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981).[6] Reimbursement payments to employees shall include interest to be computed in the manner prescribed in *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board orders that

A. Respondent Citywide Service Corp., and its alter ego Hudson Service Corp., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or suspending employees because of their union or other protected, concerted activities.

(b) Recognizing or bargaining with Production and Service Employees International Union, Local 143 Ind. as the exclusive collective-bargaining representative of the employees employed by Hudson, unless and until Local 143 has been certified by the Board as the exclusive bargaining representative of any such employees in an appropriate bargaining unit.

(c) Giving effect to the September 13, 1991 collective-bargaining agreement executed by Respondents with respect to the employees employed by Hudson, and any modifications or current extensions of that agreement.

(d) Recognizing and bargaining with Local 143 or any other labor organization at a time when such labor organization does not represent an uncoerced majority of the employees in the unit as to which recognition is extended, or when another union is the recognized exclusive bargaining representative of that bargaining unit within the meaning of Section 9(a) of the Act.

(e) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 32B-32J, Service Employees International Union, AFL–CIO as the exclusive bargaining representative of their employees in the following appropriate unit:

> All full-time and regular part-time service employees employed by the Respondent Citywide Service Corp. and its alter ego Hudson Service Corp. in any facility including residential buildings in New York, Nassau, and Suffolk counties, and New Jersey.

(f) Failing to abide by the terms of a collective-bargaining agreement with Local 32B-32J for employees in the appropriate unit.

(g) Asking employees to sign authorization cards on behalf of Local 143.

(h) Offering employees benefits, including paid vacation, sick days, holidays, and a guarantee of work, if they would abandon their grievances with Local 32B-32J.

(i) Threatening employees with discharge, and with continued harassment, if they did not abandon their grievances with Local 32B-32J, and if they did not sign a card for Local 143.

(j) Threatening to refuse to give an employee a favorable reference because of the employee's union activities.

(k) Threatening to reduce an employee's hours of work because the employee appeared in state court in behalf of Local 32B-32J.

(l) Interrogating employees concerning their union interest, activities, or membership.

(m) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Sandra Estrada, Estella Sapia, and Fernando Martinez immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them and Patricia Godash whole, in the manner set forth in the remedy section of the decision, for any loss of earnings and other benefits suffered as a result of the discrimination against them.

(b) Remove from the Respondents' files any reference to the unlawful discharges of Estrada, Sapia, and Martinez and the unlawful suspension of Godash, and notify them in writing that this has been done and that the discharges and suspension will not be used against them in any way.

(c) Withdraw and withhold all recognition from Respondent Union Local 143 as the representative of the employees employed by Respondent Employers, unless and until the labor organization has been certified by the Board as the exclusive representative of any such employees.

(d) Recognize and, on request, bargain with Service Employees International Union, Local 32B-32J as the exclusive representative of all the employees in the unit described above with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(e) On request by Local 32B-32J, reinstate the terms and conditions set forth in the January 1, 1990, to December 31, 1992 collective-bargaining agreement with that union, and make whole any unit employees and

[6] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the respondent otherwise owes the fund.

fringe benefit funds for any losses suffered as the result of the Respondent Employers' failure to adhere to and apply the provisions of that agreement to all unit employees. Any make whole relief shall be provided as set forth in the amended remedy of the Board's decision.

(f) Jointly and severally with Respondent Union Local 143, reimburse past and present employees, with interest, for all dues and fees withheld from their pay pursuant to the collective-bargaining agreement executed on September 13, 1991.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Post at its New York City location copies of the attached notice marked ''Appendix A.''[7] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Post at the same places, and under the same conditions as in the preceding subparagraph, signed copies of Respondent Union Local 143's notice to employees marked ''Appendix B.''

(j) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. Respondent Production and Service Employees International Union, Local 143 Ind., New York, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Accepting recognition from Respondent Employers, and executing and giving effect to a collective-bargaining agreement with them at a time when Respondent Union does not represent an uncoerced majority of employees in an appropriate unit or when another union is the recognized exclusive bargaining representative of bargaining unit employees within the meaning of Section 9(a) of the Act.

(b) Acting as the exclusive collective-bargaining representative of the employees employed by Respondent Employers, unless and until Respondent Union has been certified by the Board as the exclusive bargaining representative of such employees in an appropriate unit.

(c) Giving effect to the September 13, 1991 collective-bargaining agreement executed by the Respondents, and any modifications or current extensions thereof.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with Respondent Employers reimburse the employees, with interest, for all dues and fees withheld from their pay pursuant to the collective-bargaining agreement executed on September 13, 1991.

(b) Post at its business office and meeting hall copies of the attached notice marked ''Appendix B.''[8] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Furnish the Regional Director for Region 2 signed copies of the notice, in the number designated by the Regional Director, for posting by Respondent Employers at places where they customarily post notices to employees.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[8] See fn. 7, supra.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or suspend our employees because of their protected, concerted activities.

WE WILL NOT recognize or bargain with Production and Service Employees International Union, Local 143 Ind. as the exclusive collective-bargaining representative of our employees, unless and until Local 143 has been certified by the Board as the exclusive bargaining representative of any such employees in an appropriate bargaining unit.

WE WILL NOT give effect to the September 13, 1991 collective-bargaining agreement executed with Local 143 with respect to the employees employed by Hudson, or to any modifications or current extensions of that agreement.

WE WILL NOT recognize and bargain with Local 143 or any other labor organization at a time when such labor organization does not represent an uncoerced majority of the employees in the unit as to which recognition is extended, or when another union is the recognized exclusive bargaining representative of that bargaining unit within the meaning of Section 9(a) of the Act.

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 32B-32J, Service Employees International Union, AFL–CIO as the exclusive bargaining representative of our employees in the following appropriate unit:

> All full-time and regular part-time service employees employed by the Citywide Service Corp. and its alter ego Hudson Service Corp. in any facility including residential buildings in New York, Nassau, and Suffolk counties, and New Jersey.

WE WILL NOT fail to abide by the terms of a collective-bargaining agreement with Local 32B-32J for employees in the appropriate unit.

WE WILL NOT ask employees to sign authorization cards on behalf of Local 143.

WE WILL NOT offer our employees benefits, including paid vacation, sick days, holidays, and a guarantee of work, in exchange for their abandonment of grievances with Local 32B-32J, Service Employees International Union, AFL–CIO.

WE WILL NOT threaten our employees with discharge, and with continued harassment, if they do not abandon their grievances with Local 32B-32J, and if they do not sign a card for Local 143.

WE WILL NOT threaten to refuse to give an employee a favorable reference because of the employee's union activities.

WE WILL NOT threaten to reduce an employee's hours of work because the employee appeared in state court in behalf of Local 32B-32J.

WE WILL NOT interrogate our employees concerning their union interest, activities, or membership.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Sandra Estrada, Estella Sapia, and Fernando Martinez immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them and Patricia Godash whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the unlawful discharges of Estrada, Sapia, and Martinez and the unlawful suspension of Godash, and notify them in writing that this has been done and that the discharges and suspension will not be used against them in any way.

WE WILL withdraw and withhold all recognition from Local 143 as the representative of our employees, unless and until that labor organization has been certified by the Board as the exclusive representative of any such employees.

WE WILL recognize and, on request, bargain with Local 32B-32J as the exclusive representative of all the employees in the unit described above with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, WE WILL embody the understanding in a signed agreement.

WE WILL, on request by Local 32B-32J, reinstate the terms and conditions set forth in our January 1, 1990, to December 31, 1992 collective-bargaining agreement with that Union, and WE WILL make whole any unit employees and fringe benefit funds for any losses suffered as the result of our failure to adhere to and apply the provisions of that agreement to all unit employees.

WE WILL jointly and severally with Local 143 reimburse past and present employees, with interest, for all dues and fees withheld from their pay pursuant to the collective-bargaining agreement executed on September 13, 1991.

CITYWIDE SERVICE CORP. AND ITS ALTER EGO HUDSON SERVICE CORP.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT accept recognition from Citywide Service Corp., and its alter ego Hudson Service Corp., and execute and give effect to a collective-bargaining agreement with them at a time when we do not represent an uncoerced majority of employees in an appropriate unit or when another union is the recognized exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of bargaining unit employees.

WE WILL NOT act as the exclusive collective-bargaining representative of the employees employed by

Citywide Service Corp., and its alter ego Hudson Service Corp. unless and until the Board certifies us as the exclusive bargaining representative of such employees in an appropriate unit.

WE WILL NOT give effect to our September 13, 1991 collective-bargaining agreement with Hudson Service Corp., or to any modifications or current extensions of that agreement.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, jointly and severally with Citywide Service Corp., and its alter ego Hudson Service Corp. reimburse the employees, with interest, for all dues and fees withheld from their pay pursuant to the collective-bargaining agreement executed on September 13, 1991.

PRODUCTION AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 143 IND.

Leah Z. Jaffe and *David Pollack, Esqs.*, for the General Counsel.
Richard A. Medina, Esq. and *Barry Richman*, of New York, New York, for Respondent Citywide.
Lloyd Somer, Esq., of New York, New York, for Respondent Hudson.
Ira A. Sturm, Ronald Goldman, and *Paul Galligan, Esqs. (Manning, Raab, Dealy & Sturm, Esqs.)*, of New York, New York, for Local 32B-32J.
Dominick Parisi, for Local 143.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Pursuant to certain charges and amended charges, an amended consolidated complaint was issued against Citywide Service Corp. (Citywide) and its alter ego Hudson Service Corp. (Hudson) and against Production and Service Employees International Union, Local 143 (Local 143).[1]

The amended complaint alleges, essentially, that Citywide (a) temporarily suspended Patricia Godash without pay because she asserted her right to file a grievance under a collective-bargaining agreement, (b) discharged Sandra Estrada and Estella Sapia because they asserted their right to join Local 32B, (c) threatened an employee with continued harassment unless the employee quit or withdrew a grievance, (d) offered employees preferences in terms and conditions of employment if they would forgo certain rights they had accrued under collective-bargaining agreements, (e) threatened employees with discharge if they refused to forgo certain rights they accrued under the collective-bargaining agreement, and threatened that employees had been or were going to be discharged, (f) impliedly threatened employees by telling them that other employees, who had refused to forgo certain rights they accrued under the agreement, had been or were going to be discharged, (g) threatened an employee with discharge if that employee went to Local 32B, and told that employee that other employees had lost their jobs because they went to Local 32B, (h) offered employees preference in terms and conditions of employment if they agreed to forgo certain rights they accrued under the collective-bargaining agreement, (i) threatened employees with immediate discharge if they refused to renounce rights which they accrued under the collective-bargaining agreement, and (j) threatened to blackball employees by providing them with poor references.

The amended complaint further alleges that Hudson (a) interrogated an employee about his contacts with Local 32B, and told employees that if they had gone to Local 32B they could no longer work for Hudson, (b) threatened employees with unspecified reprisals and diminished hours in order to force them to quit, and (c) discharged Fernando Martinez.

The complaint also alleges that Hudson unlawfully assisted Local 143 by (a) informing employees of, and inviting them to a meeting with Local 143 on Hudson's premises, and (b) distributing authorization cards on behalf of Local 143 to its employees.

In addition, the complaint alleges that Hudson unlawfully recognized Respondent Local 143 and executed and enforced a collective-bargaining agreement containing a union-security provision with it at a time when it was not the lawfully recognized representative of Hudson's employees.

Finally, the complaint alleges that Hudson has operated as the alter ego and disguised continuance of Citywide, and that the appropriate unit consists of all employees of both employers. It is alleged that since Citywide was bound to collective-bargaining agreements with Local 32B, Hudson, as its alter ego, was similarly bound, and that by failing and refusing to be bound by such agreements, Hudson has unlawfully refused to bargain with Local 32B.

Respondents' answers to the complaint denied the material allegations thereof. Certain affirmative defenses were asserted which will be addressed, infra.

A hearing was held before me in Brooklyn, New York, on March 22 through 26 and 29, 1993.

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel, Local 32B, and the brief of Respondent Hudson which was joined in by Respondent Citywide, I make the following[2]

[1] The specifics are as follows: Sandra Estrada (Estrada) filed an original charge and an amended charge in Case 2–CA–25016 against Citywide on April 2, 1991, and March 27, 1992, respectively. Estella Sapia (Sapia) filed an original charge and an amended charge in Case 2–CA–25033, against Citywide on April 9, 1991, and March 27, 1992, respectively. Patricia Godash (Godash) filed an original and an amended charge in Case 2–CA–25057 against Citywide on April 22, 1991, and April 7, 1992, respectively. Local 32B-32J, Service Employees International Union, AFL–CIO (Local 32B) filed an original and amended charges in Case 2–CA–25331 against Hudson on October 3, 1991, April 10, 1992, and January 21, 1993, respectively. Local 32B filed a charge in Case 2–CA–25434 against Hudson on November 21, 1991. Local 32B filed a charge in Case 2–CB–14082 against Local 143 on February 28, 1992.

The original consolidated complaint was issued on June 30, 1992. Orders amending consolidated complaint, and further amending consolidated complaint were issued on January 6 and February 19, 1993, respectively.

[2] The voluminous record of a New York State Supreme Court proceeding was received in evidence at the Board hearing. That matter,

FINDINGS OF FACT

I. JURISDICTION

Citywide, a New York corporation, had until October 1991, been engaged in providing commercial cleaning and maintenance services. During the year ending June 4, 1991, Citywide provided services valued in excess of $50,000 to various enterprises located within New York State, which enterprises met a direct standard of the Board for the assertion of jurisdiction.

Hudson, a New York corporation, incorporated in 1991, has been engaged in providing commercial cleaning and maintenance services. During the calendar year 1992, Hudson provided services valued in excess of $50,000 to various enterprises located within New York State, which enterprises met a direct standard of the Board for the assertion of jurisdiction.

Citywide and Hudson admit the above facts. Based on the above, I find and conclude that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I also find that Local 32B and Local 143 are labor organizations within the meaning of Section 2(5) of the Act.[3]

II. THE ALLEGED UNFAIR LABOR PRACTICES

Citywide, a cleaning contractor, was a party, through the Service Employers Association, to two collective-bargaining agreements with Local 32B, both of which expired on December 31, 1992. Pursuant to those contracts, membership in Local 32B was required after 30 days, and Citywide was required to pay union wages of $11.97 per hour, and benefits such as paid holidays and vacations. In addition, the agreements provide for contributions by the employer to pension and welfare funds which amounted to about $5000 per employee per year.

Citywide employed between 100 and 120 employees, some of whom received the union wages and benefits set forth above. It also employed, however, certain employees who performed unit work, but who were not reported to Local 32B as having been employed more than 30 days. They received wages of about $7 to $8 per hour, enjoyed no benefits, and had no contributions made in their behalf to the pension and welfare funds.

Eventually, the nonunion employees became aware that certain of their coworkers were receiving union wages and benefits. Estrada and Sapia were two such employees.

A. *The Termination of Estrada and Sapia*

1. The testimony of the employees

Estrada became employed by Citywide in June 1990, cleaning offices. She was not a member of Local 32B, and received wages of $8 per hour.

In about August 1990, she learned that Local 32B represented her fellow workers and asked operations manager and admitted supervisor, Ernesto Cortez, if she could join that Union. Cortez told her that Mark Giacoia, Citywide's vice president, would have to decide. She inquired again of Cortez in November, and was told that Giacoia said that she had to wait. Cortez also told her that Giacoia advised him to ''play dumb,'' and said that the workers were stupid and ignorant.

In January 1991, Estrada's wage was raised to $11.40 per hour, but she did not become a union member, and received no benefits.

In about March 1991, Estrada and other workers went to Local 32B and spoke with Union Representative Barbara Paige.[4] Paige was told that the employees worked for Citywide and wanted to join Local 32B. Paige phoned Barry Richman, Citywide's president, and told him that certain named employees were present and that he had a ''very serious problem.'' She told the employees that they had to pay a fee of $300 which represented back dues, in order to become members of Local 32B. They were given an appointment for April 4 to meet with Paige.

Thereafter, on March 27, Leonal Rivas, an admitted supervisor of Citywide, told Estrada that Giacoia wanted to see her. At that meeting, at which Rivas was present, Giacoia asked her what she wanted. Estrada replied that she wanted to become a member of Local 32B and receive benefits. Giacoia answered that that would be no problem, and asked her to return to the Union and become a member as of the current date. He also asked her to withdraw her complaint about Citywide.

The next day, Estrada had another conversation with Giacoia. Other employees were present. Giacoia told her that if she withdrew her complaint with Local 32B, she would receive 2 weeks' paid vacation. Estrada asked about accumulated sick days, and was told that she would be paid for sick days earned in 1991, and that if she withdrew her complaint her job would be guaranteed for a period of 6 months. Estrada answered that she would think about it.

One or two days passed, and on March 29 or 30, she was told by Giacoia, in the presence of employees Garcia and Tzorin, and Supervisor Rivas, that they would all receive 2 weeks' vacation; a job guarantee of 6 months; and sick days, but that they should go to Local 32B that day and withdraw their case. Giacoia apparently wrote a list of the items he was guaranteeing, and asked her to sign it. She did not do so.

Estrada explained that she did not go to Local 32B because Giacoia was only offering certain benefits as of the current date. She believed that since she had been employed

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brought by Hudson to stay an arbitration sought by Local 32B, involved the question of the alter ego status of Hudson.

[3] Citywide denied knowledge of the labor organization status of Local 32B. Its denial is without merit, especially in view of its admitted collective-bargaining relationship with that Union. Citywide also denied knowledge of the labor organization status of Local 143. The facts establish that Local 143 is a labor organization. It bargains with employers in behalf of employees, and has collective-bargaining agreements with employers for those employees. It has also brought grievances in behalf of employees.

[4] The content of this conversation is a composite of the testimony of the four employees who were present: Estrada, Edgar Garcia, Sapia, and Hugo Tzorin.

for 10 months, she was entitled to benefits and union membership from the time that she became eligible for such membership and benefits.

Estrada testified that that evening, Samuel Rivera, Citywide's admitted supervisor, asked whether she had withdrawn her case at Local 32B that day. She said that she had not. Rivera asked her to do so tomorrow, so that he would be able to call Giacoia and tell him to ''sleep peacefully.'' Estrada replied that she would not go to the Union, whereupon Rivera said that if she did not go to Local 32B she would be fired.

The following, day, Rivas called Estrada and told her that she no longer worked for Citywide because there was no more work. On April 1, Rivas told Estrada that the real reason for her discharge was that she did not sign the paper proffered by Giacoia.

Estella Sapia began work for Citywide in March 1990, cleaning offices, and earning $8 per hour.

In about July 1990, she became aware that certain of her coworkers were members of Local 32B, and she asked Supervisor Cortez about this. Cortez told her that since she was a route employee who did not have a permanent assignment, she was not eligible for union membership. In September 1990, Sapia again asked Cortez about union membership. He said he would speak to Giacoia. Cortez reported to her that Giacoia said that the workers did not need to become union members because they had jobs, and in any event, were ignorant and stupid.

In January 1991, Sapia's wages increased to $11.40, but she did not receive union membership or any benefits. In March 1991, she went to Local 32B with Estrada, as set forth above.

Thereafter, on March 27 or 28, she was asked by Giacoia at a meeting at which Rivas was present, why she wanted to become a union member. She replied that she has been working long enough for Citywide to become a union member, and that she wanted to enjoy the same benefits as her coworkers. Giacoia told her to tell Union Agent Paige that she wanted to be a union member as of the date she went to the Union. He cautioned her not to apply for retroactive benefits since she would have to pay $300 to the Union for retroactive dues. Giacoia further promised a $780 payment; 2 weeks' paid vacation; paid holidays; and a 6-month guarantee of work.

Sapia did not return to Local 32B because she did not want to lose her retroactive benefits.

On about the next day, Rivera asked her if she had signed the union papers. She said she had not. Rivera replied that Giacoia was very upset with her because she had promised to go to the Union. He also told her that Estrada had been fired for refusing to sign the union papers. He showed her a letter, which stated in part that she agreed to accept 2 weeks' paid vacation, $700, and a job guarantee of 6 months. She refused to sign it, and asked to take it home. Rivera refused to give it to her, telling her that if she did not sign it he was to tear it up, which he did.

About 1 week later, on April 8, Rivera told Estrada to report to Citywide's office. Present were Giacoia, Rivas, and employee Tzorin. Richman spoke to them by phone, through a speakerphone. Richman denied this conversation, but Sapia testified that Rivas said that Richman could not attend the meeting, but would speak to those assembled by speakerphone.

Richman said that Sapia should go to the Union to sign the papers, and that following that he would give her a check, and another check the next week. Sapia replied that she would not go to Local 32B because certain things were not clear to her. She asked for 1 more day to think about it. Richman refused to give her any more time, and insisted that she sign the papers, saying that if she did not sign, she could consider herself as being ''out of the company,'' and should return her keys. Sapia begged for a chance to consider the offer and continue working for Citywide, but Richman demanded that she sign at that time or return her keys. Sapia refused, and gave her keys to the supervisors. That was her last day of work.

The conversation then turned to Tzorin, who also refused to sign. Richman said that in June or July, when Citywide's contract with the Lighthouse was canceled, he would be the first person to leave, and that he would not give him a favorable letter of recommendation. Tzorin said that that did not matter as he was a good worker. Richman then told Tzorin that he would be working only until June.

Edgar Garcia worked for Citywide since December 1989, as a cleaner, receiving $8 per hour, with no benefits.

From October 1990, Garcia asked Cortez about joining Local 32B. Cortez said that business was slow and that he could not join at that time. In December 1990, Cortez told him that he could become a union member in January 1991, but Cortez left the Company before then. Garcia then asked Rivas about union membership. Rivas told him to speak to Union Agent Paige. He accompanied certain employees to the Union, as set forth above.

Garcia stated that he went to Local 32B twice. During the evening after the second meeting, he was spoken to by Rivera. Rivera told him that Giacoia was offering 2 weeks' vacation and a 6-month job guarantee. Garcia was asked to tell Paige that he had no problems with Citywide.

The following day, Giacoia made those promises himself to Garcia. Garcia replied that the employees wanted to become union members as of the date of their hire, not as of the current date.

The next day, Rivera asked Garcia to sign a paper guaranteeing 6 months' work. Garcia refused to sign. Rivera told him that Citywide would lose certain customers in June 1991, and that he, among others, would be laid off. Rivera urged him to accept the offer of 2 weeks' pay and the job guarantee, noting that Estrada would be discharged shortly.

In early April 1991, Richman asked Garcia why he did not listen to Giacoia or Rivera.

Garcia received a letter of termination on June 12, 1991. It stated, inter alia, as follows:

> Due to the recent loss of work and the need to consolidate jobs; we are forced to assign your work to senior union members.

Garcia's testimony is not alleged as a violation, and I accordingly make no findings concerning it.

2. The testimony of the supervisors

Supervisor Rivas testified that, in January 1991, he was asked by Estrada, Sapia, and Garcia whether he could put

them into Local 32B. Rivas inquired of Giacoia, who told him that they would have to wait. Following a raise in their wages, Rivas told Estrada and Sapia that a salary reduction might be necessary. They asked how they could avoid that action, and Rivas suggested that if they became union members, their salaries could not be reduced. They then went to Local 32B, as set forth above.

Rivas further testified that on March 31, 1991, he translated for Giacoia during his meeting with Estrada, Sapia, and Edgar Garcia. Rivas stated that Giacoia asked the employees why they went to Local 32B. They replied that they wanted to belong to that union. Giacoia answered that that was no problem, and asked them to tell Union Agent Paige that Citywide would take care of everything.

Rivas testified that he was present at the speakerphone meeting, at which he heard Richman ask Sapia and the others to tell the Union that everything was all right. They refused, and Richman threatened them with discharge.

At another meeting, Rivas heard Giacoia offer Garcia higher wages and a guarantee of 6 months' work.

Toward the end of the their employment, Estrada and Garcia were given applications by Citywide for membership in Local 32B. Rivas asked them to leave blank their date of hire at Citywide. After the employees completed the applications, bookkeeper Lila Charney and Giacoia inserted the date of hire as 1 month before the current date. Giacoia told Rivas to tell the employees that this action benefited them because they would not have to pay the union retroactive dues from their actual date of eligibility for membership in the Union. When Rivas told the employees this, they said they wanted to become union members as of their date of hire, because they were entitled to medical benefits, holiday pay, and sick pay.

Rivas also testified that Estrada and Sapia were discharged because they went to Local 32B, and because they sought membership in that Union. According to Rivas, the decision was made by Richman 1 or 2 days before Rivas actually terminated them.

Citywide President Barry Richman testified that he did not recall any speakerphone conversation with employees in which a grievance concerning Local 32B was discussed. Nor did he recollect threatening anyone.

Vice President Giacoia and Rivera testified in this proceeding, but did not specifically testify concerning the statements attributed to them.

Analysis and Discussion

The testimony establishes that in March 1991, Estrada and Sapia engaged in the protected, concerted activity of obtaining membership in Local 32B, and in insisting on their right to become members as of the proper date. Giacoia was opposed to this, as demonstrated by his offer, in late March, of 2 weeks' paid vacation and sick days, and a 6-month guarantee of work. Giacoia asked them to withdraw their complaints with Local 32B. They refused to do so. Estrada credibly testified that Supervisor Rivera threatened her with discharge if she did not withdraw her grievance. The following day she was discharged, the official reason given as lack of work, but Supervisor Rivas told her that the real reason was her refusal to agree to the benefits offered by Giacoia in return for her withdrawal of her grievance at Local 32B.

Sapia was similarly threatened with discharge by Giacoia if she did not withdraw her grievance, and if she did not accept the offer of benefits by Giacoia. In addition, on April 8, Richman demanded that she withdraw her case at Local 32B, and accept Citywide's offer. She refused and was immediately discharged.

Supervisor Rivas also testified that Estrada and Sapia were discharged because they sought membership in Local 32B.

I note that there was testimony that Citywide encouraged Estrada and Sapia to become members of Local 32B. It did so, however, only after the employees made known their desire to join that Union, and was done with an intent to deprive them of full membership, from the time of their eligibility, by having them join as of the current date.

Based on the above, I find that the General Counsel has established a prima facie case that the union activities of Estrada and Sapia, in attempting to secure their rights under the Local 32B contract, were motivating factors in their discharge by Citywide. *Wright Line*, 251 NLRB 1083 (1980).

Having found a prima facie case for unlawful motivation in the discharges of Estrada and Sapia, the burden shifts to Citywide to prove that it would have discharged them even in the absence of their union activities. *Wright Line*, supra. I find that Citywide has not carried its burden. The only defense which was raised concerning Estrada was her testimony that she was told that the ''official'' reason for her discharge was that there was no more work. This explanation was given only 1 day after her confrontation with Rivera, who threatened her with discharge if she did not withdraw her grievance. No defense was asserted as to Sapia's discharge.

I accordingly find and conclude that the discharge of Estrada and Sapia violated Section 8(a)(3) and (1) of the Act.

B. *The Suspension of Godash*

Patricia Godash began work for Citywide in November 1987. She was a member of Local 32B and had a regular schedule.

In about March 1991, Supervisor Rivera told her that he had received complaints that she was not cleaning thoroughly. She worked 3 hours that evening cleaning the area, but received pay for only 1 hour and 45 minutes work. A couple of days later, on March 22, Rivera made the same complaint, and this time she worked 6 hours prior to Rivera's inspection, and was again paid for only 1 hour and 45 minutes. Rivera was again not satisfied with the work she had done, and told her to clean it again.

Godash then filed a grievance with Local 32B. Union Agent Paige said that she would speak to Richman about the matter and about a pending matter with Estrada.

Godash complained to Giacoia that she should have been paid for the additional hours she worked. Giacoia apologized for the problems with the two companies, and asked her what she was ''going to do about the union.'' She replied that she was letting the grievance stand and would await an upcoming meeting between Paige and Richman.

Godash worked on April 5, her last day before she took a vacation. On such occasions in the past, it was customary for Citywide to assign a coworker to work the last night with the employee scheduled for vacation, so that the routine could be explained, and so that the keys to the buildings could be given to the substitute. When Godash inquired of

Rivas, he told her that no one would be assigned to her that night. He also requested that she call Rivera and give the keys to him.

That evening, she was told by Andre, a Citywide employee, that Rivera asked him to obtain the keys from Godash. She refused since she had more areas to clean. She called Rivera and explained that to him. He was satisfied with her reply, and told her to call him when she was finished. At about 2 a.m. she called Rivera several times but he did not answer the call. She called Rivera again at 5 a.m. and again received no answer. She spoke to Supervisor Mike, told him that she could not reach Rivera, and was told that Mike did not know where Rivera was.

On April 8, Godash phoned Rivas, who yelled at her for not turning in her keys. She explained that she could not reach Rivera. Rivas told her that Rivera did not receive any of her calls, and that Mike denied speaking to her. Rivas insisted that she return the keys that day, but Godash refused because she had to remain home to await a delivery. She told Rivas that she had given Rivera copies of the keys in the past. Rivas insisted that he needed Godash's keys. Godash brought the keys in the following day.

Godash was informed that she was suspended for 3 days. The suspension letter stated that Godash did not call, as instructed, so that Rivera could pick up her keys, and that Citywide was unable to obtain entry to three companies as a result of her actions.

On her first night of work after her suspension, Godash was given her usual keyring containing keys to the companies she was to clean. On arriving at one company, Godash found the elevator to one of the buildings she was supposed to clean locked. The key to the elevator is ordinarily on her keyring, but this time it was missing. She spoke to Supervisor Nelson Hernandez, and complained that ''games'' were being played on her. She threatened that she would notify Local 32B. Hernandez said, ''[O]kay. Godash then left that building and went to her next assignment.

Immediately after, Rivera called and said that he and Hernandez were just at the company she called from and found the elevator unlocked. Rivera added that she was playing games with them, and that they would not leave her alone until she either dropped her grievance or quit her employment.

Godash attempted thereafter, without success, to obtain a key to the elevator from Citywide. She needed the key because she cleaned this company's premises on a daily basis.

On June 12, 1991, Godash received a letter notifying her of her discharge, effective June 28, by Citywide. The letter stated that ''due to the recent loss of work and the need to consolidate jobs, we are forced to assign your work to senior union members.'' Godash's discharge has not been alleged as an unfair labor practice.

I find that the General Counsel has made a prima facie showing that Godash's protected activity in filing a grievance protesting her failure to be paid for extra hours she worked was a motivating cause for her suspension. *Wright Line*, supra.

Thus, in late March, Giacoia knew that Godash had filed a grievance concerning that matter, asked her what she intended to do about it, and was told that she would pursue it. Her suspension occurred only about 1 week later. It is likely that Citywide bore animus toward Godash because of her filing the grievance. I have found that coworkers Estrada and Sapia were discharged, in part, for their failure to withdraw grievances filed with Local 32B.

Significantly, immediately on her return to work from her 3-day suspension, Godash threatened to inform Local 32B of the harassment she received following her return, and was told by Supervisor Rivera that she would not be left alone until she dropped her grievance or quit. This clearly indicates that Citywide bore animus toward her concerning her filing the grievance, and thus relates back to the reason for her suspension. I accordingly find that the General Counsel has made a prima facie showing that her suspension was motivated by her activities in filing a grievance.

In its defense, Citywide relies on its letter of suspension which states that Godash did not call Rivera so that her keys could be picked up, and that Citywide was unable to obtain entry to three companies due to her actions.

It appears that Citywide deviated from its practice of providing a substitute on the day prior to her vacation. If such practice was followed, Godash would have given her keys to the substitute without incident. Her testimony that she phoned Rivera, pursuant to his instruction, when she finished her work, in order to turn in her keys, is credited in view of Rivera's failure to testify. In addition, Rivera was apparently aware of Godash's schedule and could have met Godash at any of the locations she was assigned to clean and obtained the keys then. Rivera was apparently satisfied with her refusal to give the keys to Andre because she had more areas to clean. Moreover, Godash gave uncontradicted testimony that Rivera had copies of all her keys.

I accordingly find that Citywide has not met its burden of proving that it would have suspended Godash in the absence of her union activities. *Wright Line*, supra.

C. *The Alter Ego Issue*

The complaint alleges that Citywide and Hudson are a single employer, and that Hudson has operated as a disguised continuance of Citywide, and an alter ego of Citywide. Specifically, the complaint alleges that the two companies have common officers, ownership, management, and supervision; a common labor policy; provided services for and made sales and purchases to and for each other; and interchanged personnel with each other.

The General Counsel alleges that the facts establish that, although Citywide appeared to have closed, in fact it continued its operation through Hudson. The motivation for this subterfuge is alleged to be Citywide's desire to avoid its obligation to the Local 32B funds, to which it owed substantial amounts of money, and a wish to conduct its business more profitably by operating a nonunion company, or operating with a more acceptable union, thereby avoiding its obligation to continue honoring its collective-bargaining agreement with Local 32B and the wages and benefits provided therein.

Respondent Employers deny these allegations, asserting that Citywide completely closed its business due to financial considerations, and that Hudson was formed and operated as a totally independent company with no relation to Richman or Citywide.

An examination of the circumstances surrounding the closure of Citywide and the opening of Hudson is necessary to resolve this issue.

1. The closure of Citywide

Citywide had been in operation from about 1984 through October 1991. Its president and sole shareholder was Barry Richman. Richman testified that Citywide enjoyed a period of rapid growth through 1989. Due to the effects of the recession, however, it experienced, in late 1989, losses of major accounts and a rise in bad debts. These factors resulted in a loss, in 1990 and early 1991, of about $1.5 million out of a total of $4 million in gross sales.

Richman also attributed Citywide's losses to smaller accounts taken from him by nonunion shops which offered cleaning services at a lower price than Citywide.

Although Richman attempted to stem these losses by reducing overhead, he found that he could not cut enough overhead expenses to make up for the reduced cash flow experienced by Citywide.

Citywide was also indebted to the Local 32B funds in an amount in excess of $300,000. Richman stated that he first became aware of this indebtedness in late February 1991, when he was served with a legal action by the funds. On his review of the matter, he learned that Citywide bookkeeper Lila Charney had failed to make payments to the funds and ''hid'' this fact from Richman. He attributed Charney's actions, who had been a ''meticulous'' worker for nearly 9 years, to ''insanity.'' Richman was unable to obtain any reduction in the amount owed to the funds nor credit for interest and penalties. He, however, made a payment of $30,000 to the funds. Although Richman became aware of the ''unilateral'' failure to make payments to the funds in February, he decided to cease making any further payments, for amounts owed to the funds through the time that Citywide allegedly ceased operating in October 1991.

According to Richman, as his business losses mounted, and the indebtedness to the Local 32B funds became impossible to resolve, he decided, in February or March 1991, that Citywide would close.

At that time, he told Mark Giacoia, Citywide's vice president, that Citywide would be closing by the end of 1991, and that he should look out for his own interests. Giacoia told Richman that he wanted to start his own business.

In May or June 1991, Giacoia told Richman that he wanted to open a cleaning business, and asked whether he could take some of Citywide's accounts. Richman replied that he did not care since Citywide was going out of business, and he was leaving the cleaning industry. Richman explained his failure to sell his business or his accounts to Giacoia on the ground that neither Citywide, nor its accounts were sellable because of the lawsuits pending against his Company. Although Giacoia had signed a restrictive covenant, agreeing not to solicit any of Citywide's accounts, Richman waived that covenant.

Richman testified that even though Citywide failed, he believed that Giacoia's business would succeed because the new company had a different and more profitable plan: it would be nonunion, or have a non-Local 32B union, and therefore would have a lower price and expense structure. Indeed, Richman predicted that if Giacoia's new company had a contract with Local 32B, it would ''run into the same problems'' that Citywide ran into.

2. The opening of Hudson

a. *Hudson's formation and financing*

Hudson was formed in May 1991, by Paul Sessler, an attorney, who was at that time the attorney and accountant for Citywide. Giacoia is the sole shareholder of Hudson. Camille Savoy is named in the certificate of incorporation as a director of Hudson. Giacoia testified that he did not know who Savoy was. Richman testified, however, that Savoy was an art dealer and friend of Richman and from whom Richman purchased sculpture. Savoy expressed an interest to Richman in investing in a business. Richman suggested that Savoy contact Sessler. Savoy did not, however, invest any money in Hudson.

Giacoia testified that after he unsuccessfully attempted to obtain startup money for Hudson from friends and relatives, he asked Richman if he could lend him the money. Richman said he did not have such funds at that time. Richman testified, however, that he did not want to lend Giacoia any money because he wanted to leave the cleaning industry. But he suggested that his wife could make such a loan. Richman's wife, Kimberly Miller Richman, discussed the loan with her husband and agreed to lend him $60,000. Richman conceded that much of the source of the money was from him, constituting funds that he had given her during their marriage, and that he advised his wife to make the loan. Richman further advised her that a promissory note should be executed by Giacoia. No such note was prepared, however, and the loan agreement remained oral, to be repaid, on demand, at the rate of 9-percent interest.

Giacoia repaid the loan in full by withdrawing the funds from Hudson, depositing them in his personal account, and writing a personal check to Miller.[5]

It also appears that Richman paid Hudson's first payroll, which was paid to the employees in cash. Hudson began its operations on August 5, 1991. Giacoia stated that he believed that Hudson paid the payroll for that week from its own funds. After reviewing the records, however, he then stated that there were no entries in Hudson's disbursement account which would show such payments. He then asserted that Richman lent him $7000 to $8000 for that payroll, which was repaid without interest by Giacoia in small, cash payments of about $400 per month, which were delivered to Richman's apartment by messenger.

[5] Richman testified that if he sought to capitalize Hudson himself he would not have utilized his wife to make the loan. He did, however, attempt to interest an outsider, Savoy, in making an investment in Hudson, but Savoy did not do so. Giacoia's attempt to avoid making a connection between Miller and Richman was painfully obvious in a deposition he gave in the state court proceeding. He identified her, at first, as ''an acquaintance, a friend'' he had known for 4 years. He stated that he met her through a ''business acquaintance'' and then socially, and then they became friends. He further stated that he did not know the business acquaintance through whom he met Miller. He then stated that she was the office manager of a client Citywide had been servicing. It was only when counsel for Local 32B asked if she had ''any connection at all with Richman'' that Giacoia recalled that she was married to him. Interestingly, at the state court hearing, he stated that he did not really know Miller socially, did not know whether she was employed at that time, but then said that she was employed as a nursery school teacher, and possibly a clerical. At the Board hearing, Giacoia testified that he met Miller through Richman.

Richman denied that he financed Hudson's first week's payroll and denied receiving cash payments from Giacoia for this purpose.

Hudson has a separate and different office, phone number, and bank account than Citywide. Richman is not and has not been a director or shareholder in Hudson.

b. *Hudson hires Citywide's employees and obtains Citywide's accounts*

The regular, permanent, key office employees employed by Citywide were hired by Hudson. Such persons included bookkeeper Charney, computer operator and ''girl Friday'' Carmen Sanders, and salespersons Joseph Crowder, Lori Kent, and Milton Rothstein. Also, supervisory personnel were hired by Hudson to perform the same duties that they performed at Citywide. Such individuals are Operations Manager Leonal Rivas, Supervisor Sam Rivera, and Nelson Hernandez, who was a supervisor at Citywide, and worked as a head porter at Hudson. The computer system, billing procedures, and customer identification numbers, which were in use at Citywide, were transferred to Hudson and used in the same manner by that Company.

The wages and commission rates for the salespeople remained the same when they became employed by Hudson. Kent testified that, at the end of her employment with Citywide, she was told by Richman that that Company was ''going in a different direction.'' Indeed, Citywide's notice to its customers stated that it was ''changing direction.'' Richman explained that he did not want to tell his customers that Citywide was going out of business as they might seek to avoid payment of their bills.

Leonal Rivas testified that he began work for Hudson on October 7, 1991, and worked for 2 weeks. He was then told by Giacoia that Richman suggested that Rivas apply for unemployment benefits, claiming that he was laid off for lack of work from Citywide. Rivas received such benefits for 3 weeks, during which time he remained in daily contact with Giacoia by beeper, responding to work questions by Giacoia. During the 3 weeks, Rivas prepared the Hudson payroll on weekends, and he received from Giacoia a sum of money equal to the difference between his salary and unemployment benefits. At the end of the 3-week period, Rivas returned to work for Hudson.

Francisco Martinez, a cleaner for Citywide, testified that Citywide's manager, Rivas, told him in mid-September 1991, that Citywide was considering closing, and that Richman was selecting the best employees to work at Hudson. Rivas added that Martinez was one of those chosen. He began work at Hudson in late September or early October 1991.

An interrelation between Citywide and Hudson is apparent from the activities engaged in by employees being paid by Citywide, yet performing services for Hudson. Thus, while employed and paid by Citywide, the salespeople began soliciting their Citywide accounts for Hudson. Kent testified that she brought about 80 percent of her Citywide customers to Hudson through such solicitation. Her agreement not to compete with Citywide was never raised by Richman or Giacoia.

Although Richman testified that he was not aware that his salespeople were soliciting Citywide's accounts for Hudson, Giacoia, Citywide's vice president and owner of Hudson, was aware of this. In fact, Giacoia testified that Richman wanted to help Giacoia's new business succeed by permitting him to solicit Citywide's accounts, and they had an ''understanding'' that Citywide's salespeople could solicit its accounts for Hudson.

Giacoia testified that the Citywide salespeople were able to obtain nearly 75 percent of Citywide's general cleaning and window cleaning customers for Hudson.

Notwithstanding that Richman admittedly was interested in money-making opportunities, he received no payment for all of Citywide's business which Hudson obtained or for the window cleaning accounts. In contrast, Richman did sell two accounts to Arcade Maintenance, for which Richman received a monthly commission of $2650 to $3700, from the time that Citywide closed, through at least January 1993, when Arcade lost the accounts.

Richman's explanation for this disparity was that Citywide's accounts were small, route jobs which were billed at $200 to $500 per month, which he did not believe were salable. He did not, however, try to sell them. The accounts which he sold to Arcade, however, were major accounts, representing billings of $40,000 to $50,000 per month. He further stated that the two accounts required their service to be performed by a company having a collective-bargaining agreement with Local 32B, which Arcade had.

Richman's other explanation is instructive concerning his true motive in not accepting commissions from Giacoia—a deliberate attempt to avoid a finding of alter ego status for Hudson. When asked by the state supreme court justice whether it had occurred to him to ask Giacoia for a commission on the Citywide business obtained by Hudson, Richman responded:

> It occurred to me. That would have put me in jeopardy via what we're doing here. Because I had a contract already with 32B. If I was helping him as a successor company then I would be guilty of what I'm sitting here doing. My hands were tied in many respects. I have no adversity to earning money. I don't mean that facetiously. Had I retained accounts like the Lighthouse, I would have brought them into a larger billing. I would have gone ahead and done that. What Mark was doing, I would have had to sit here and tell you I helped him move companies from one company to the other. Therefore, I'm guilty, which that's my reason.

Nor was Richman apparently concerned with making certain that Citywide received all of the money it was due from its customers. Giacoia testified that $11,000 in checks due Citywide from its last months of business were sent to Hudson, in the form of separate checks payable to Hudson and to Citywide, and deposited in Hudson's account. This was discovered only when the bank which had foreclosed on Citywide's receivables inquired of Hudson as to whether it was sent any checks due Citywide. It should be noted that all moneys due Citywide in this respect were repaid by Hudson.

c. *Hudson obtains equipment and supplies from Citywide*

Following his move from Citywide to Hudson, employee Fernando Martinez testified that on the weekend of October 5, 1991, he disassembled the furniture and desks at Citywide's location, and moved them, with lamps and chairs, to

Hudson's office. This comprised about six trips back and forth and a total of 15 hours. That job also included moving equipment and supplies from Citywide to Hudson, such as vacuum cleaners, various machines, mops, and cleaning supplies. Martinez testified that he used the same equipment, such as vacuums, buckets, mops, and waxing machines, that he had used at Citywide. He stated that Rivera instructed him to remove stickers from the equipment bearing Citywide's name, and replace them with a painted ''H.''

Martinez also testified that the two vans which were owned by Citywide were used by Hudson, and that in early October, he put stickers containing Hudson's name and address on the vans. Thereafter, the vans were used in the same way as they were used at Citywide. Official Rivas corroborated this testimony. Giacoia testified that on the formation of Hudson, he obtained permission from Richman to ''borrow'' one van for 4 to 6 weeks until he could get organized. Thereafter, he rented, and then leased, another van. Giacoia denied that the van was used to transfer supplies from the offices of Citywide to Hudson.

Cleaning employee Blanca Samuel who worked for Citywide, and then for Hudson, testified that she used the same equipment at Hudson that she had used at Citywide, including vacuums, brooms, brushes, and mops. She also stated that she observed that the furniture at Hudson's office was the same as that used prior thereto at Citywide's office.

Admitted Hudson Supervisor Samuel Rivera testified that the refrigerator, water cooler, file cabinets, and furniture were moved from Citywide's office to Hudson's. He received written instructions from Giacoia, some of which were received in evidence, to transfer supplies from Citywide to Hudson.

Leonal Rivas, operations manager at Citywide, and then at Hudson, testified that, while employed by Citywide, he ordered equipment and supplies in behalf of Citywide, and then transferred them to Hudson. There was also evidence that supplies, located at jobsites serviced by Citywide, were taken over by Hudson. Giacoia testified that Citywide received no compensation for the supplies that Hudson obtained from the jobsites. He conceded that contractors generally retrieve their supplies from jobsites they leave. In addition, Rivas testified that he told Richman that Citywide's supplies were transferred to Hudson in the evening, and that Richman told him to continue this practice.

Richman's explanation for the transfer of equipment and supplies was that much of the equipment such as vacuum cleaners and floor waxers had no value, was in poor repair, and that he had no interest in taking such equipment since he was leaving the cleaning business and could not store that equipment. He testified similarly that with respect to the supplies at jobsites, mops and buckets were of no value to anyone, and that it would cost time and money for him to have those supplies removed. He therefore just abandoned them.

The evidence concerning the purchase of a fax machine is instructive. A fax machine was purchased for $487.11 by Citywide's check in August. The General Counsel asserts that the fax was purchased by Citywide for Hudson. Richman testified that he purchased that machine for his personal use at home to wind up the business. Giacoia testified that he purchased a fax machine at the same store at the same time for Hudson's use. No Hudson check could be produced which shows that it was purchased by that company. Giacoia stated that he purchased it for cash. In addition, in August, Giacoia purchased an air conditioner for Hudson, using two Citywide checks. Richman testified that Giacoia obtained the checks in error, and that Giacoia repaid him thereafter, but Giacoia was not certain that he repaid Richman.

It also appears that Citywide paid for the installation of computer software at Hudson's premises. Both Richman and Giacoia testified that that was a mistake. In September 1992, the computer company advised Giacoia that the invoice for the work was inadvertently sent to Citywide.

d. *Richman's continued involvement in Hudson*

In early September 1991, before Rivas became employed by Hudson, he was told by Richman that Richman and Giacoia obtained a ''good'' union, or one that was okay for Hudson. The union was identified as Local 143.

Rivas testified that in November, while he was employed by Hudson, he was phoned by Richman who asked him to submit an affidavit denying the facts given by Martinez in the state court proceeding.

Rivas testified that following his state court testimony in which he testified in behalf of Local 32B, Giacoia asked him why he testified as he had, adding that many people would be damaged by his testimony. Rivas told him that he wanted to resign, and Giacoia asked him, as a personal favor, to stay until mid-March, because Giacoia was planning a vacation and needed Rivas. Rivas replied that he did not believe that Richman would want him to remain employed after hearing what his testimony was. Giacoia said that he would speak to Richman. The following day, Giacoia told Rivas that Richman became very angry at being told the nature of Rivas' testimony and cursed him. Giacoia then gave Rivas a resignation letter to sign.

Rivas' credibility has been called into question. Rivas gave damaging testimony against Respondent Employers at this hearing and at the state court hearing. Respondents assert that his testimony must be discredited because he admittedly made false statements in affidavits submitted in their behalf. Respondents further assert, in deriding his credibility, that although he signed an agreement with Hudson not to solicit any of Hudson's accounts, he nevertheless admittedly contacted certain of those customers, informed them that he had left Hudson's employ, and inquired as to whether they were satisfied with the work being performed by Hudson. Although Rivas denied soliciting those accounts, his inquiry came about as close to solicitation as could be imagined. Respondents also assert that Rivas has an interest in giving false testimony because his wife, Sandra Estrada, is a charging party here whose discharge is at issue.

Notwithstanding the above, I credit Rivas' testimony in full. His testimony at this hearing, which was basically consistent with that at the state court trial, was supported by extensive documentation in the form of notes from company officials including Giacoia and supervisors, regarding instructions concerning the moving of equipment and supplies from Citywide to Hudson, and the moving of jobs from employees who were members of Local 32B to nonunion workers. In addition, much of his testimony on these critical issues was either not contradicted or not adequately rebutted. He explained that he signed statements in behalf of his employer because he believed that he had to sign them.

Analysis and Discussion

The Board has ''generally found alter ego status where the two enterprises have 'substantially identical' management, business purpose, operation, equipment, customers, and supervision as well as ownership.'' *Advance Electric*, 268 NLRB 1001, 1002 (1984). The Board also considers in making this determination ''whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act.'' *Advance*, supra, or ''to permit the original company to avoid its labor relations obligations.'' *Marbro Co.*, 310 NLRB 1145, 1148 (1993). In addition, the Board considers the nature and extent of the negotiations and formalities surrounding the transaction, and the absence of arm's-length dealing between the parties tending to indicate the existence of a disguised continuance. *Fugazy Continental Corp*., 265 NLRB 1301, 1302 (1985). ''No one factor is determinative of alter ego status, and not all of these indicia need be present to find that an alter ego relationship exists.'' *MIS, Inc*., 289 NLRB 489, 491–492 (1988).

It must be reemphasized that Hudson was formed 5 months before Citywide closed, and began operating 2 months before Citywide closed. Hudson was formed with capital from the Richman family, the sole investor. That transaction was not an arm's-length business arrangement which could be expected from two separate entities. The loan of $60,000 was not evidenced by a writing, and it was repaid in cash in small amounts delivered to Richman.

It may be said that management remained substantially identical. Richman took an active role in the formation of Hudson, participating in ensuring that a friendly union was obtained, and in directing the removal of equipment and supplies from Citywide to Hudson, and in selecting the ''best'' workers for Hudson. Giacoia sought advice from Richman concerning whether Rivas should continue in Hudson's employ.

The business purpose and operation of the two companies was identical: they were both involved in the commercial cleaning of offices. Hudson used much of the same equipment and supplies which it initially obtained from Citywide. Hudson's customers were obtained from Citywide in the startup phase, and were solicited by Citywide's sales representatives, who became employed by Hudson. *Yerger Trucking*, 307 NLRB 567, 574–575 (1992). The supervisors, too, transferred from Citywide to Hudson. They supervised employees who also transferred from Citywide and who performed the same work, with the same equipment, for the same customers, when employed at Hudson. *C. J. Rogers Transfer*, 300 NLRB 1095, 1100 (1990).

Citywide paid Hudson's first payroll, making such wage payments to employees who were transferred from Citywide to another company and then to Hudson's payroll. Citywide also paid for the purchase of a fax machine, air conditioners, and the installation of a computer program.

Large amounts of supplies and equipment were moved from Citywide to Hudson without compensation. Supplies left on jobsites by Citywide were, despite industry practice, not retrieved by that company, but were taken by Hudson, also without compensation. Citywide's accounts were permitted to be solicited by its employees for Hudson, while still on Citywide's payroll, and no compensation was made for those accounts, although Citywide had received payment for other accounts assigned to other cleaning companies.

It also appears that Hudson was formed so that Citywide could avoid its obligation to Local 32B. Citywide owed enormous sums of money to the Local 32B funds and simply stopped making payments to those funds. It is clear that Richman devised a plan to continue operation through Hudson with a new, more acceptable union, and make it appear that Citywide was closing its operations. This is supported by the testimony of Rivas that, beginning in early April 1991, Giacoia told him to replace the Local 32B members who were working on Citywide's jobs with nonunion workers. The Local 32B employees were either laid off or had their hours reduced. He stated that at the time he left Citywide in October, 90 percent of the jobs were being serviced by nonunion workers.

I accordingly find and conclude that Hudson was merely a disguised continuance of Citywide, and that the closing of Citywide and the opening and operation of Hudson was motivated by a desire to avoid dealing with Local 32B and in an effort by Citywide to avoid its obligations to Local 32B. I therefore find that Hudson is an alter ego of Citywide. *C. J. Rogers Transfer*, 300 NLRB 1095, 1100 (1990).

D. *The Discharge of Fernando Martinez*

Martinez became employed by Citywide as a cleaner in June 1989. He became a member of Local 32B, 1 year after becoming employed and began earning $11 per hour.

On September 11, 1991, Rivas told Martinez that Citywide might close, and that he had been selected as one of the best workers to move to Hudson. He was offered a salary of $10 per hour, and was told that there was no union at Hudson currently, but that there might be one.

On September 13, Martinez was introduced to Local 143 Representative Miguel Santos by Citywide Supervisor Nelson Hernandez and Hudson Supervisor Sam Rivera. Santos asked him to sign a card for Local 143. Martinez refused, saying he was a member of Local 32B. Rivera replied that if he did not sign a card for Local 143, he would no longer be working there, and would not be hired by Hudson. Martinez testified in the New York State Court proceeding that Santos said this to him. Martinez did not sign the card at that time, but later, when asked by Giacoia, he signed. Martinez' card is dated September 30.

Martinez began work for Hudson in late September or early October.

On November 7, Martinez appeared in New York State Supreme Court in behalf of Local 32B to testify in an action brought by that union against Hudson. He testified in this Board hearing that, on seeing him in state court, Giacoia shook his head from side to side. Martinez returned to work that day, whereupon Rivas told him that Giacoia saw him in court and that they would take action against him, by cutting his hours in half and thereby forcing him to quit.

Martinez stated that his hours were not cut because there was much work, but on November 14, he was told by Rivas that there was no work that night, and that he should return the following day. Martinez came back the next day and was told that there was no more work for him, and that he was terminated. In early December, Rivas told him that he was fired unjustly, and that Rivas had been told by Giacoia that Hudson could not have enemies within the Company.

Rivas testified that he told Giacoia that Martinez was working 45 to 50 hours per week. Giacoia instructed Rivas to reduce his hours to a maximum of 25.[6] Rivas further testified that in late November, Giacoia told him that he saw Martinez at state court, and referred to him as a ''spy,'' and instructed Rivas to discharge him, which he did within 1 or 2 days.

Giacoia admitted seeing Martinez at state court, assumed that he was there in behalf of Local 32B, and stated that he may have mentioned to Rivas that he saw him there, but denied that his presence at the courthouse caused his layoff.

I find that the General Counsel has made a prima facie showing that Martinez' presence in the state court room, in behalf of Local 32B, was a motivating factor in Hudson's decision to discharge him. Martinez engaged in activities in behalf of Local 32B by appearing to testify in its behalf. Giacoia was aware of his presence at the courthouse in behalf of Local 32B. Giacoia bore animus toward Martinez, as seen by Giacoia's shaking his head in a negative manner when he saw him. An immediate order was given to Rivas to cut his hours, and Supervisor Rivas later admitted to Martinez that he was fired because he was viewed by Giacoia as an ''enemy'' or a ''spy.''

The timing of the discharge lends support to the General Counsel's case. Thus, Martinez was present at the state courthouse on November 7, he was told 1 week later, on November 14, that there was no more work for him, and the following day he was terminated.

I accordingly find that the General Counsel has established a prima facie showing of unlawful motivation in the discharge. *Wright Line*, supra.

In Hudson's defense, Giacoia testified that Martinez was laid off because of loss of work, and that other employees were laid off for the same reason at that time.[7] Giacoia testified that in deciding who to lay off, he complied with the provisions of the Local 143 contract, which requires that the least senior employee be laid off first. He conceded, however, that his selections were not always accurate, although when selecting employees for layoff, he looked at Hudson's records which list the hire date of the employees.

Accordingly, he stated that he examined Hudson's books and found that Martinez was less senior than other employees. Hudson did not produce subpoenaed documents which would have shown the employees' dates of hire. Other documents, however, were received in evidence. But even those documents are suspect. Thus, one document stated that Martinez' date of hire was October 7, but Giacoia testified that that was a mistake, since Martinez was actually hired on September 30. In addition, Martinez' name was not on the payroll record for the payroll period ending October 6.

In examining Hudson's records, Giacoia conceded that employees Carlos Dominques and Alex Garcia, who had greater seniority, but who were laid off, out of seniority, before Martinez. Giacoia testified, however, that those ''terminated'' may not have been terminated for lack of work, but may have quit. Accordingly, Hudson's records do not support a finding that employees were laid off in accordance with seniority.

On being confronted with the above facts, Giacoia stated that Martinez was laid off because he was a floor waxer, and with the loss of accounts there was little floor waxing to be performed. Giacoia conceded that he laid off floor waxers last because their skills were needed, but nevertheless laid off Martinez. He stated that Martinez was the least senior of three floor waxers, and that Martinez was laid off based on his seniority as a floor waxer. Giacoia stated that the payroll records do not indicate who was a floor waxer, and he conceded that the contract's seniority provision does not provide for layoffs based on type of job performed.

Thus, Giacoia's testimony regarding Martinez represents an attempt to adroitly shift positions once a position previously taken has been rebutted. Thus, Giacoia first testified that Martinez was laid off for lack of work. When supporting documents were not forthcoming, Giacoia stated that he was laid off according to seniority. When it was shown that other more senior employees were terminated before him, he stated that the more senior employees may not have been laid off at all, but may have quit their employment. When no records were forthcoming concerning who quit or was laid off, Giacoia testified that Martinez was laid off according to seniority among the floor waxers. Finally, it was shown that the contract did not provide for seniority by position, nor why Martinez could not have performed, or been offered employment in, a less-skilled position.

I accordingly find that Hudson has not met its burden of proving that Martinez would have been laid off even in the absence of his activities in behalf of Local 32B. *Wright Line*, supra.

E. *The Assistance to and Recognition of Local 143*

The complaint alleges that Hudson rendered unlawful assistance to Local 143 by informing its employees of, and inviting them to a meeting with, Local 143 on Hudson's premises, and by distributing Local 143 authorization cards to its employees. The complaint also alleges that Hudson violated the Act by granting recognition to, and entering into, and maintaining, a collective-bargaining agreement with Local 143 at a time when it was not the lawfully recognized collective-bargaining representative of its employees. Local 143 is also alleged as having unlawfully accepted such recognition. Respondents Hudson and Local 143 deny these allegations.

Giacoia testified that he first learned of the existence of Local 143 in early September 1991, when he was contacted by its president, Anthony Parisi. This contact occurred about 1 week before he executed a collective-bargaining agreement with that Union. Parisi told him that a certain number of employees had signed cards for that Union, and that he wished to meet and negotiate a contract. Giacoia resisted, but Parisi told him that the Union represented a majority of Hudson's employees. The number of cards that Parisi had was not mentioned, and Parisi did not ask him how many employees were employed at Hudson.

Giacoia testified that he met with Parisi about 3 to 4 days later. Giacoia stated that he could have met with Parisi on September 13. Parisi showed Giacoia more than 15 authorization cards. Giacoia testified that based on that, he understood that Local 143 represented a majority of Hudson's employees, but that he had no reason to believe that Local 143

[6] Rivas' testimony that this instruction occurred in late October is an obvious error in view of Martinez' testimony.

[7] I affirm my ruling rejecting Hudson's offer of a document listing accounts which were allegedly canceled, because underlying, supporting documentation, although subpoenaed, was not produced.

represented a majority of those employees. The two men spent most of the day negotiating and agreeing to the terms of a collective-bargaining agreement. They agreed on a starting wage of $6 per hour, with raises after 30 and 90 days to $6.25 and $6.50, respectively. Parisi did not ask Giacoia how much he was currently paying his workers, and Giacoia readily agreed to the rates offered because they were lower than the rates of pay his workers were then receiving. The contract contained a union-security provision which provided that membership in Local 143 was required, as a condition of employment, 30 days from the effective date of the agreement or from the date of hire.

Giacoia further testified that on September 23, Parisi's brother, Dominick, a Local 143 business agent, delivered a copy of the contract for Giacoia to sign. The contract contained the signatures of nine employees. Giacoia then signed it. He testified that there were about 40 employees then employed by Hudson, and that he had ''no reason to believe that Local 143 represented a majority of Hudson's employees.''

Anthony Parisi did not testify. Dominick Parisi testified that he was contacted by Hudson employee Miguel Santos. Parisi met Santos and other employees on September 13. About six or seven employees signed cards at that time, and Parisi gave them other cards to distribute to their coworkers. Dominick further testified that about eight additional cards were given to him on September 19, and others were mailed to the union office. Martinez testified that Giacoia asked him to sign a card, and he did so. His card is dated September 30.

In order to determine whether Local 143, in fact, represented a majority of Hudson's employees on the date of recognition, that date must be determined. It is conceded that recognition occurred days before the contract was executed.

There was varying testimony concerning the execution date. The complaint alleges that the contract was executed on September 13. Giacoia and Parisi testified that the contract was signed on September 23. There was substantial evidence that the contract was executed on September 13. Thus, the agreement states that it was made and entered into on September 13, and the anniversary dates regarding wage increases and expiration are September 13. Parisi testified that he gave the wrong date to his secretary, who allegedly mistakenly typed September 13 at various places in the contract.

The Union's representative status must be viewed as of the date of recognition, which according to Respondents, occurred prior to the contract's execution on September 23, i.e., on September 22 or before. Local 143 had 14 signed authorization cards from employees prior to September 23.[8]

For the week ending September 20, Hudson's payroll lists 37 names, including 1, Espiridion Ocon, who worked only one-half hour. For the week ending September 27, the payroll lists 40 names, including 1, Jose Ortiz, who worked no hours and appears to have been terminated.[9]

Accordingly, even assuming that Hudson recognized Local 143 some time before September 23, the date that Respondents claim they executed the agreement, Local 143 had signed authorization cards from 14 employees, out of a total complement of, at best, 36 employees. Accordingly, at the time of Hudson's recognition of Local 143 that Union did not represent a majority of Hudson's employees.

The nine cards obtained by Local 143 which are dated September 23, cannot be counted toward Local 143's majority support. Such postrecognition authorizations cannot validate a collective-bargaining agreement which was based on nonmajority recognition. *Human Development Assn.*, 293 NLRB 1228, 1229 (1989).

It thus appears that Respondents' arrangement was made in haste, perhaps even before Hudson began its operations on August 5, 1991, in order to ensure that Local 143, and not Local 32B, represented the employees. Proof of this may be seen in the proposals sent by Hudson to prospective clients. The proposals, which stated that ''all employees are members in good standing with . . . Local 143,'' bore dates of August 7, 12, 15, 19, 20, 23, and 25. Significantly, these proposals were sent before Giacoia, according to his testimony, knew of the existence of Local 143, and certainly before Local 143 represented any of Hudson's employees.

Giacoia's explanation of these proposals strains credulity. He testified that the proposals were sent out on the dates noted without any reference to Local 143. Then, following his execution of the collective-bargaining agreement, he directed his secretary to add the material concerning Local 143 and again send the same proposal with the original date, so as to make it ''more comfortable'' for the customers, and to inform them that his employees were ''now'' members of Local 143. He termed this procedure an ''administrative foulup'' because it is his practice that letters sent out on a certain date bear the date that they are mailed. These letters represent an ''exception'' to that practice.

Further evidence of a plan to quickly recognize Local 143 may be seen in Giacoia's attitude toward unions generally. He testified that as a businessman starting a new company, his interest was in keeping his costs and overhead down, especially his labor costs, which he knew would be his major expense. He also stated that if he could avoid a union contract he would do so. Only 1 month after opening his business, however, he agreed to meet with Local 143 based on a phone call from Parisi who stated that he represented some of Hudson's employees. At that meeting, a collective-bargaining agreement was readily entered into. Although it is understandable that Giacoia would quickly agree to an agreement which provided for lower wages than his employees were currently earning, the evidence suggests that Giacoia was motivated as much as, if not more than, a desire to utilize the Local 143 agreement as a device to thwart Local 32B's organizational efforts.

I accordingly find and conclude that Hudson recognized Local 143 as the exclusive bargaining representative of its employees, and entered into a collective-bargaining agreement at a time when Local 143 was not the lawfully recognized exclusive collective-bargaining representative of Hudson's employees.

I thus find that Hudson, by recognizing Local 143, and that Local 143, by accepting recognition, and that both Respondents, by executing a collective-bargaining agreement

[8] Those cards were dated between September 13 and 19. Two additional cards were undated. As of September 13, Local 143 had only seven cards.

[9] For the week ending September 6, the payroll lists 34 employees, including 4 who appear to have been terminated. For the week ending September 13, the payroll lists 41 employees, including 5 who appear to have been terminated.

containing a union-security agreement at a time when Local 143 was not the lawfully recognized exclusive collective-bargaining representative of Hudson's employees, violated the Act.

I also find that Supervisor Rivera unlawfully asked Martinez to sign a card for Local 143, and that Giacoia made the same request of employee Blanca Samuel, infra.

F. *The Alleged Violations of Section 8(a)(1)*

The complaint alleges that numerous violations of Section 8(a)(1) have been committed.

1. The alleged promises

I have found that on about March 28, 1991, Citywide Official Giacoia told Estrada that if she withdrew her complaint with Local 32B concerning her joining the Union as of her date of hire, she would receive 2 weeks' paid vacation, sick days, and a guarantee of 6 months' work. I have also found that about 2 days later, Giacoia told her, and employees Garcia and Tzorin, that they would receive the same benefits if they withdrew their grievance at Local 32B.

I have also found that Citywide Official Giacoia told Sapia on about March 27 that if she did not request Local 32B membership as of her date of hire, she would receive $780, 2 weeks' paid vacation, paid holidays, and a 6-month guarantee of work.

I have further found that on about April 8, Citywide President Richman, in an apparent reference to the offers previously made, promised to give Sapia two checks in consecutive weeks if she would sign those papers and go to Local 32B.

In addition, I have found that Garcia was told by Citywide Supervisor Rivera and Giacoia that he would be given 2 weeks' vacation and a 6-month guarantee of work, and was told to tell the Local 32B agent that he had no problems with Citywide.

In all of the above instances, the employees were offered benefits in order to induce them to abandon their grievance with Local 32B. As set forth above, their assertion of the grievance that they should receive contractual benefits from their date of hire constituted protected activity. The offer of benefits to them in order to cause them to abandon their protected activity interfered with their right to engage in such activity. That conduct violates Section 8(a)(1) of the Act.

2. The alleged threats

I have found that on about March 28, Supervisor Rivera expressed disappointment with Sapia that she did not sign certain papers at Local 32B, and told her that Estrada had been discharged for refusing to sign those papers. Advising an employee that another had been discharged for her union activities violates Section 8(a)(1) of the Act. *IMAC Energy*, 305 NLRB 728, 730 (1991).

I have found that on about March 29, Citywide Supervisor Rivera told Estrada that if she did not withdraw her grievance with Local 32B she would be discharged. The filing of a grievance is protected activity, and Estrada had a right to continue to pursue her grievance. Threatening her with discharge if she did not withdraw it violates the Act. Cf. *Northwest Community Nursing Service*, 306 NLRB 602 fn. 4 (1992).

I have also found that on April 8, Richman threatened to discharge Sapia if she did not sign certain papers at Local 32B, which apparently were to authorize the union to begin her union membership as of the current date, and not her retroactive date.

I have further found that at the same time, Richman threatened Tzorin with discharge for refusing to sign the paper. I also find that Richman's statement to Tzorin, made at the same time, that he would not give him a favorable letter of recommendation violates the Act. Although not strictly a threat of blacklisting, Richman clearly threatened to deny Tzorin a privilege which he apparently would have received on his leaving Citywide's employ. Thus, in the same breath, Richman threatened him with discharge for attempting to enforce the Local 32B contract, and told him that he would not give him a favorable reference on his discharge. Cf. *Heartland of Lansing Nursing Home*, 307 NLRB 152, 158 (1992).

In addition, I have found that Rivera threatened to discharge Garcia if he did not accept an offer of 2 weeks' pay and a guarantee of 6 months' work, coupled apparently with his agreement to tell the Local 32B agent that he had no problems with Citywide.

I also find that Rivera's statement to Godash that he and Supervisor Hernandez would not leave her alone until she dropped her grievance with Local 32B or quit, constitutes an unlawful threat of harassment because she filed a grievance.

As to the above threats to Sapia, Tzorin, Garcia, and Godash, it is clear that all three employees were attempting to assert rights under the collective-bargaining agreement with Local 32B. Sapia, Tzorin, and Garcia sought to base their union membership on their correct, earlier hire date, and not the current date as proposed by Citywide. Godash's grievance also sought payment, under the terms of the agreement, for work performed which had not been paid for. Thus, the employees were engaging in activities designed to obtain Citywide's compliance with the terms of the agreement with Local 32B and were thus protected. Threats and promises made to them for engaging in this activity were coercive. *Transpac Fiber Optics*, 305 NLRB 974, 975 (1991); *Scott Lee Guttering Co*., 295 NLRB 497, 505 (1989).

I also find that Martinez was threatened with discharge if he did not sign a card for Local 143. Martinez testified in different forums, variously, that Citywide Supervisor Rivera told him that, and that Local 143 Agent Santos made that remark. But it is clear that both Rivera and Santos were present when the statement was made, and both adopted it. Martinez had no obligation to sign a card for Local 143, and could not be threatened with discharge for refusing to do so. *Miss Elaine, Inc*., 274 NLRB 181, 185 (1985).

I also find that Rivas' statement to Martinez on November 7 that his hours would be cut, forcing him to quit, was in retaliation for his appearance at state court in a matter brought by Local 32B seeking to find Hudson responsible under the Local 32B contract. Martinez' presence at the courthouse was protected activity. *T & W Fashions*, 291 NLRB 137 fn. 2 (1988). The threat to reduce his hours was unlawful. *Swan Coal Co*., 271 NLRB 861, 868–869 (1984).

3. The alleged interrogations

I have found that on about March 27 Giacoia asked Sapia why she wanted to become a union member. *Fiber Glass Systems*, 298 NLRB 504, 505 (1990). The issue is whether

the interrogation reasonably tends to restrain, coerce, or interfere with employees' rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176 (1984). This constitutes an unlawful interrogation. Sapia had expressed a desire to join Local 32B some months earlier, and this question, asked by a high company official, required Sapia to make an explanation defending and supporting her right to union membership. She need not do this, and Citywide violated Section 8(a)(1) of the Act in asking the question.

The complaint also alleges an unlawful interrogation of Blanca Samuel. I cannot find that an unlawful interrogation occurred. On September 23, while employed by Hudson, Samuel arrived late to work. The following day, Rivera asked her why she was late. She said she had a problem, and Rivera inquired what the problem was. She answered that she had a medical appointment with Local 32B, whereupon Rivera said he had nothing to do with that union, and asked her to show the appointment letter to Giacoia, which she did. Giacoia told her that he had nothing to do with Local 32B, and said that Hudson has a new union, and gave her a Local 143 authorization card to sign.

Rivera did not initiate the inquiry concerning the union. He was merely asking why she was late. It does not appear that Rivera had any reason to believe that Samuel's late arrival at work had anything to do with Local 32B. Rather, Samuel volunteered to Rivera that she was late due to an appointment with the union. I will accordingly recommend dismissal of this allegation of the complaint. I do not find, as asserted by the General Counsel in her brief, that the remarks by Rivera and Giacoia that they have nothing to do with Local 32B are unlawful threats.

G. *Hudson's Refusal to Bargain with Local 32B*

1. The procedural question

On September 30, 1991, Local 32B filed a charge in Case 2–CA–25331, which alleged that since July or August 1991, Hudson dominated and interfered with a labor organization in violation of Section 8(a)(1), (2), and (3) of the Act by contributing financial and other support to Local 143, and by requiring its employees to abandon their support of and membership in Local 32B, and join Local 143.

On April 9, 1992, Local 32B filed a first amended charge against Hudson, which repeated the above allegations, and added that Hudson unlawfully granted recognition to Local 143, executed a collective-bargaining agreement with it, and deducted dues from its employees' pay at a time when Local 143 did not represent a majority of Hudson's employees in violation of Section 8(a)(1), (2), and (3) of the Act.

On January 21, 1993, Local 32B filed a second amended charge against Citywide and its alter ego Hudson, which repeated the allegations set forth in the original charge filed on September 30, 1991, and added the further allegation that since about August 5, 1991, the Employer has refused to bargain with Local 32B by failing to implement and apply the collective-bargaining agreement, and existing terms and conditions of employment in violation of Section 8(a)(1), (2), (3), and (5) of the Act.

On February 19, 1993, the Regional Director issued an order further amending consolidated complaint. The order set forth that the consolidated complaint was amended to allege that since August 5, 1991, Citywide and Hudson have failed and refused to apply and maintain the terms and conditions of employment set forth in the collective-bargaining agreement between Citywide and Local 32B in violation of Section 8(a)(5) and (1) of the Act.

Hudson filed an answer to the order further amending consolidated complaint, in which it denied the material allegations thereof.

Citywide had a collective-bargaining agreement with Local 32B, which expired on December 31, 1992, and which set forth the following appropriate collective-bargaining unit:

> All full-time and regular part-time service employees employed by the employer in any facility including residential buildings in New York, Nassau, and Suffolk counties and New Jersey.

At the hearing, Citywide stipulated that at all times material, Local 32B represented a majority of Citywide's employees in the appropriate collective-bargaining unit, and that Citywide was a party to the above-described collective-bargaining agreement with Local 32B.

At the hearing, Hudson amended its answer to allege that the first amended charge and the second amended charge were untimely filed.

The General Counsel concedes that the second amended charge, filed nearly 1-1/2 years after the alleged refusal to bargain occurred, was untimely filed. She defends, however, on the ground that 10(b)'s requirement that charges must be filed within 6 months of the alleged unfair labor practice is tolled by the employers' actions in fraudulently concealing the fact that Hudson was the alter ego of Citywide.

The General Counsel further admits that, although Local 32B ''clearly had reason to believe that Hudson was merely a disguised continuance of Citywide as far back as October 1991,'' it was justified in not filing a charge alleging its conduct as violative of Section 8(a)(5) because it was unable to confirm its suspicions until a long discovery process was undertaken as part of state and Federal litigation.

There is no question, as the General Counsel concedes, that Local 32B had reason to believe that Hudson was the alter ego of Citywide in October 1991. On October 17, 1991, Supervisor Rivas gave an affidavit to Local 32B in which the facts concerning the scheme to open Hudson as the alter ego of Citywide was laid out in detail.

In addition, Kevin McCulloch, the assistant to the president of Local 32B, testified that in the summer of 1991, the Union became aware of contract violations committed by Citywide, including layoffs out of seniority and employees not being paid union wages and benefits, and was also told by employees that Citywide was planning to close, and that they could become employed by Hudson. McCulloch then stated that Local 32B ''commenced an arbitration which included Hudson as an alter ego of Citywide,'' the purpose of which was to ''have Hudson as Citywide bound by the union [agreement].''[10]

McCulloch further testified that the Union's funds brought an arbitration action against Citywide to determine the amount of money it owed the Local 32B funds. On October 7, 1991, the arbitrator issued an award finding that Citywide owed certain moneys to the funds. Thereafter, the funds

[10] The transcript lists ''treatment'' as the bracketed word, but obviously the word should be ''agreement.''

brought an action in Federal court against Citywide and Hudson as the alter ego of Citywide to obtain compliance with the arbitrator's award.

Section 10(b) of the Act provides, in part, that ''no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge.''

The General Counsel alleges that the failure of Local 32B to timely file the charge should be excused because of Respondents' fraudulent concealment of its alter ego relationship. It is clear, however, based on the above, and as conceded by the General Counsel, that Local 32B was aware of the material facts which constituted the unfair labor practice, as early as October 1991. The General Counsel asserts, however, that it was not able to definitely substantiate its belief that a violation had occurred, until the lengthy court discovery proceedings.

A charging party is not held to such a rigorous standard in order to file a charge. It need not have conclusive evidence that a violation has occurred. ''All that is required is that the 'act' giving rise to unlawful conduct be known. To require more would reduce 10(b) to the meaningless.'' *Al Bryant*, 260 NLRB 128, 135 fn. 19 (1982).

''The period of limitations prescribed by Section 10(b) does not begin to run . . . until the person adversely affected is put on notice of the act constituting it.'' *Burgess Construction*, 227 NLRB 765, 766 (1977). Exculpatory statements by an employer which are false or misleading or not sufficient to toll Section 10(b) where the charging party independently was aware of certain facts suggesting possible unlawful conduct. *Girardi Distributors*, 307 NLRB 1497, 1511 (1992). Here, Rivas came forward in October 1991, with evidence of an 8(a)(5) violation, and Local 32B was aware, at about that time, that such an unfair labor practice had occurred, as set forth above. *H. A. Green Decorating Co*., 299 NLRB 157 fn. 2 (1990), relied on by the General Counsel is inapposite. In that case, the 10(b) period was tolled until an employee provided evidence to the union. Here, Rivas did just that in October 1991. In addition, Local 32B commenced an arbitration which named Hudson as an alter ego, and sought to enforce another arbitration award against Citywide by naming Hudson as the alter ego of Citywide.

In order to establish a fraudulent concealment, it must be found that there has been (a) deliberate concealment, (b) material facts were the object of the concealment, and that (c) the injured party was ignorant of those facts, without any fault or want of due diligence on its part. All three elements must be met to warrant the tolling of the statute of limitations. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946).

It is clear that Local 32B was aware of the material facts constituting the alleged refusal to bargain by Respondents as early as October 1991, and that the 10(b) period began to run as of that time. It became aware of such facts when Supervisor Rivas gave an affidavit to it, and when it brought its arbitration cases. Thus, Local 32B was not ignorant of the facts which could have been made the subject of a charge at that time. *Brown & Sharpe Mfg. Co*., 312 NLRB 444 (1993). I accordingly find and conclude that the second amended charge and the order further amending consolidated complaint are barred by Section 10(b) of the Act.

2. The merits

If the Board finds that Section 10(b) did not bar the second amended charge or the order further amending consolidated complaint, I find that Hudson, as the alter ego of Citywide, was obligated to adhere to, and was bound by, the collective-bargaining agreement that Citywide had with Local 32B. *RCR Sportswear*, 312 NLRB 513 (1993); *C. J. Rogers Transfer*, 300 NLRB 1095, 1101 (1990).

H. *The General Counsel's Request for a Sua Sponte Finding*

Counsel for the General Counsel requests that I make a sua sponte finding that Respondents violated Section 8(a)(3) of the Act by failing to retain Citywide's employees for work at Hudson. She asserts that such a finding is warranted by the fact that Giacoia admitted that Hudson's failure to retain the employees was due to their membership in Local 32B.

The failure to retain those employees was not alleged in any charge or in the complaint. Nevertheless, the General Counsel argues that a finding is warranted because Giacoia admitted the violation, the matter was fully litigated, and the issue was closely connected to the subject matter of the complaint.

Giacoia testified that as a new businessman, he sought to keep his costs down, and that if he was required to pay his employees the wages and benefits provided in the Local 32B contract he would be operating on a ''shoestring.'' He described the Local 32B rates as ''prohibitive'' and ''economically unfeasible,'' and for that reason he did not hire anyone who was represented by that union. He further testified that, for economic reasons, he had no intention of operating a union shop, or recognizing Local 32B, and he therefore knew that he could not retain any of the cleaning personnel employed by Citywide.

Based on the above testimony, the General Counsel asserts that a violation has been established, through Giacoia's testimony, and that therefore the matter was fully litigated.

I do not agree that the matter has been fully litigated, or that the issue is closely connected to the matters alleged in the complaint. *Pergament United Sales*, 296 NLRB 333 (1989), relied on by the General Counsel, is inapposite. In that case, the complaint alleged an 8(a)(3) refusal to hire. Although that allegation was dismissed, the Board found an 8(a)(4) violation, based on an employer official's testimony that he refused to hire certain employees because a charge was filed. The Board stated that the 8(a)(4) issue was closely connected to the subject matter of the complaint because both allegations focus on the same set of facts—the lawfulness of the employer's motivation for failing to hire the employees.

Here, there was no allegation in any charge, and no allegation in the complaint which alleged Hudson's refusal to retain the employees of Citywide. It thus cannot be said that the refusal to retain the employees was involved in this case at all. I cannot base a finding on a matter which has not been alleged, which has been raised for the first time in a posthearing brief, and as to which Respondents have received no formal notice. *Medin Realty Corp*., 307 NLRB 497, 503 (1992).

Accordingly, I deny the General Counsel's request for a sua sponte finding that Respondents failed and refused to re-

tain the employees represented by Local 32B who were employed by Citywide.

CONCLUSIONS OF LAW

1. Respondents Citywide Service Corp. and Hudson Service Corp. are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At all times material, Hudson has been the alter ego of Citywide.

3. Local 32B and Local 143 are labor organizations within the meaning of Section 2(5) of the Act.

4. By discharging Sandra Estrada and Estella Sapia, and by temporarily suspending Patricia Godash, Respondent Citywide violated Section 8(a)(3) and (1) of the Act.

5. By discharging Fernando Martinez, Respondent Hudson violated Section 8(a)(3) and (1) of the Act.

6. By recognizing Local 143 as the exclusive bargaining representative of its employees, and by entering into a collective-bargaining agreement containing a union-security clause with Local 143 on September 13, 1991, covering the employees, at a time when Local 143 did not represent an uncoerced majority of the employees, Respondent Hudson violated Section 8(a)(1), (2), and (3) of the Act.

7. By accepting recognition from Respondent Hudson, and by entering into a collective-bargaining agreement with Respondent Hudson, Respondent Local 143 violated Section 8(b)(1)(A) and (2) of the Act.

8. Respondent Hudson violated Section 8(a)(1) and (2) of the Act by asking its employees to sign authorization cards on behalf of Local 143.

9. By offering its employees benefits, including paid vacation, sick days, holidays, and a guarantee of work, if they would abandon their grievance with Local 32B, Respondent violated Section 8(a)(1) of the Act.

10. By threatening its employees with discharge, and with continued harassment, if they did not abandon their grievances with Local 32B, and if they did not sign a card for Local 143, and by threatening to refuse to give an employee a favorable reference, Respondent Citywide violated Section 8(a)(1) of the Act.

11. By threatening to reduce an employee's hours of work because he appeared in state court in behalf of Local 32B, Respondent Hudson violated Section 8(a)(1) of the Act.

12. By interrogating employees, Respondent Hudson violated Section 8(a)(1) of the Act.

13. I do not find, as alleged in the complaint, that Respondent Employers violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Local 32B as the exclusive collective-bargaining representative of their employees, inasmuch as the second amended charge and the order further amending consolidated complaint are barred by Section 10(b) of the Act.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act. In addition, Respondents will be ordered to rescind their bargaining relationship and to reimburse all employees for dues and fees withheld from their pay pursuant to the collective-bargaining agreement executed on September 13, 1991.

The amounts to be paid to discharged employees Sandra Estrada, Estella Sapia, Fernando Martinez, and to suspended employee Patricia Godash, to make them whole for any loss of earnings and other benefits, and the amounts I shall recommend that Respondents reimburse the employees, shall be computed in the manner prescribed in *Florida Steel Corp*., 231 NLRB 651 (1977), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]